In the

Supreme Court of the United States.

October Term, 1901.

THE FRENCH-GERMAN LAUNDRY COMPANY,
Plaintiff in Error,

vs.

No. 214.

OLIVE SPRINGER.

BRIEF FOR THE PLAINTIFF IN ERROR.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE FRENCH-GLENN LIVESTOCK COMPANY,
Plaintiff in Error,
vs.
ALVA SPRINGER,
} No. 124.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement.

In the year 1877 the officers of the Interior Department surveyed certain lands in the State of Oregon lying contiguous and near to a large non-navigable body of water called Lake Malheur. The plats were duly approved and placed on file in the proper local land office, and have never been withdrawn, canceled, or otherwise discredited by the Government. The surveyed lands were sold and otherwise disposed of with reference to the plats of 1877. Certain tracts, designated as lots 3 and 4 in sec. 34, and lots 1 and 2 in sec. 35, T. 36 S., R. 31 E., were patented to the State of Oregon under the swamp land grant of March 12, 1860, and the title so conveyed has come to the present plaintiff in error (pp. 32, 33).

These lots were represented on the plat of 1877 as bounded on the north by the waters of Lake Malheur.

It appears that, in November, 1896, there was a body of dry land lying between the north boundary of the said lots, the meander line of the survey, and the then actual water line of the lake, and that the defendant Springer had occupied such intervening tract. The plaintiff in error brought suit, in one of the courts of Oregon, against Springer, to recover possession of this tract, claiming it as accretion to the patented land above mentioned. Defendant answered, denying plaintiff's title, and, by way of special defense, alleging (p. 5):

"That said pretended meander line was run or surveyed in the year 1877, and that a new meander line was run through that part of the county in 1895, varying materially in much of its course from that run in 1877, and that neither of them was actually run along or near the margin of said lake anywhere in the vicinity of the tract described in the complaint, but that each of said lines was run a mile or more from the actual margin of said lake, leaving a tract of public land comprising many hundreds of acres, well adapted to agricultural purposes, between said alleged meander lines and the margin of said lake, unsurveyed of which the tract here in controversy is a part; that said lands are in the same general condition, and of the general character that they were when said meander lines were run; that for a long time prior thereto, and ever since there has been as defendant is informed and believes, no appreciable recession of the waters of said lake, nor have there been any appreciable accretions of land along that side of said lake nearest the land in controversy; the lands here claimed are not accretions, nor are they lands made suitable for agriculture by the recession of the waters of said lake since plaintiff acquired title to any of the lands adjoining them or since said surveys."

Issue having been joined, the cause came on for trial in May, 1897. Plaintiff proved its title to the patented land and put in evidence the plat of 1877 (pp. 32 *et seq.*). It also produced evidence tending to show that Lake Mal-

heur had, at the date of that survey, extended as far as the meander line fixed on that plat, and that the water had, from various causes, receded, during the intervening twenty years, to its present stage (pp. 34 *et seq.*). The character and extent of defendant's evidence are thus stated in the opinion of the Supreme Court of the State (p. 54), though the record does not otherwise show such evidence:

"On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at anytime extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake and a consequent reliction of land in front of the said lots."

At the close of the evidence, the trial court, at the request of the defendant and over the exceptions of the plaintiff, gave to the jury a series of instructions to this effect:

That the government plats were not conclusive evidence that a lake existed north of the land sold to the plaintiff;

That the jury should find for the defendant unless convinced that there "was in reality a lake north of and adjoining said lots" belonging to the plaintiff, no date being fixed as that at which the lake must have washed the lots;

That the verdict must be for the defendant, unless (at sometime not at all indicated), the jury found a lake to have existed "immediately north" of the said lots;

That if the jury found that a swamp or marsh had been "immediately north of and adjoining the said lots," then the verdict must be for the defendant;

That, before the plaintiff could succeed, the jury must be convinced that, on *March 12, 1860*, the date of the swamp land grant to the State, "said lots were bounded on the north by the waters of Malheur lake";

That the verdict must be for the defendant unless the jury were satisfied by a preponderance of the evidence that the lots named "bordered on the meander line," and that "the waters have receded and left the lots described in the complaint * * * as accretions to said land" (pp. 51, 52).

Under these instructions verdict passed for the defendant and judgment was entered thereon. That judgment having been affirmed by the Supreme Court of Oregon, a writ of error brings the case here. The opinion of the appellate court is in the record (p. 52).

Assignment of Errors.

It is submitted that the Supreme Court of Oregon erred:

First. In not reversing the judgment on account of the error of the trial court in giving the following instruction to the jury:

"I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34; and lots 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian is not conclusive evidence of the existence of a lake; you will therefore weigh and consider all the evidence in this case and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defendant" (p. 51).

Second. In not reversing the judgment an account of the error of the trial court in giving the following instructions to the jury:

"I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 2 (3) and 4 in section 34 and 1 and 2 in section 35 township 26 south, range No. 31 E. Willamette meridian; but if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant. In other words, it is a fact for you to determine whether or not that was a lake" (p. 51).

Third. In not reversing the judgment on account of the error in giving the following instruction to the jury:

"The evidence in this case shows that plaintiff was the owner of lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian, in this county. This is not the property described in the complaint in this cause; but the plaintiff claims that by reason of the ownership of this property, it also claims the property described in the complaint, and bases its right of recovery in this action upon such right to ownership. In order for plaintiff to recover in this action it must be shown by a preponderance of the evidence that on or about the 12th day of March, 1860, said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the defendant" (p. 52).

Fourth. In not reversing the judgment on account of the error in giving the following instruction to the jury:

"I instruct you that, before you can find for the plaintiff, you must be satisfied, from a preponderance of the evidence, that lots 3 and 4 in section 34, and 1 and 2 in

section 35, township 26 south, range No. 31 E. Willamette meridian, bordered on the meander line. You must also be satisfied, from a preponderance of the evidence, that the waters have receded and left the lots described in the complaint, here in dispute, as accretions to said land, or from which the waters have permanently receded so as to leave them in the condition they are now" (p. 52).

Argument.

I.

The jurisdiction of this court is abundantly established by the following cases:

Cousin v. Blanc, 19 How., 202.
Maguire v. Tyler, 1 Black, 195.
R. R. Co. v. Schurmeier, 7 Wall., 272.
Packer v. Bird, 137 U. S., 661.
Knight v. Land Ass'n, 142 U. S., 161.
Shively v. Bowlby, 152 U. S., 1.
Glasgow v. Baker, 128 U. S., 571.

II.

In that one of the instructions given by the trial court which is set out in our third assignment of error, the jury are told that:

"In order for the plaintiff to recover in this action, it must be shown by a preponderance of the evidence that, on or about the 12th day of March, 1860, [the date of the grant of swamp lands to the State of Oregon], said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the defendant."

In the next preceding instruction, the jury are told that the plaintiff can not succeed unless, at some date not even

remotely indicated, there was a lake "immediately north" of the lots, and that:

"If you believe from the evidence that there was [no date being fixed] a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant. In other words, it is a fact for you to determine whether or not that was a lake."

It would be difficult to understand the reference in one of these instructions to the date of the swamp grant, and in the other to a hypothetical strip of swamp land between the meandered boundary of the lots and the actual water line, did not the opinion of the appellate court elucidate the underlying theory of these propositions. From that opinion (p. 57) it appears that the defendant contended that the grant of swamp land is limited to land of that particular character; that it can not be enlarged by accretion attaching to it; and that the present plaintiff, claiming under a patent for swamp land, must be limited to the meandered boundary of the plats, and can not claim the ordinary riparian rights in any accretions.

The instructions go even further than this, and hold that the plaintiff's grantor, the State of Oregon, took under the swamp land grant only land in existence in 1860, and that the title conveyed by the patents to the State must be limited by the water mark as it stood seventeen years before the survey.

While the appellate court does not expressly approve this contention, it does not hold to the contrary, and overlooks the clear error embodied in the instructions, and the affirmance of the judgment by the Supreme Court of the State amounts to an approval of the instructions given and an adoption of the theory upon which they are based.

It is as difficult to perceive what reasons can be urged in support of this novel and extraordinary contention as

it is to find authority for it. The proposition is that a grant of swamp land is of a singular character in this, that while a grant of any other kind of land carries with it as an incident, the right to future accretions, the patentee of swamp land is deprived of that right. It will not be pretended that there is anything in the statute making the grant of swamp lands which suggests any such difference, nor can it be imagined that there is anything in the nature of the case which should deny to the purchaser of swamp lands rights which inhere in the purchase of timber lands, desert lands, or ordinary agricultural lands.

In only a few cases has anything like this proposition been urged, and, in all the cases known to counsel in which the point has been passed upon, it has been held that accretions attaching to swamp land belong to the owner of the swamp land precisely as would be the case if the original purchase were of any other kind of land:

Fillmore v. Jennings, 78 Calif., 634.
Lux v. Haggin, 69 Calif., 255.
The Middle Grounds, 7 Land Dec., 255.

The argument in the court below seems to have been that the grant of swamp land does not carry any land under water; and that, as the grantee of riparian swamp land does not take the abutting lake bed, he can not claim any part of it when left dry and attached to his shore holding.

The riparian owner's right to accretions, however, does not at all depend upon his original ownership of the soil under the adjacent water, since such an owner who bounds upon navigable water becomes entitled to accretions as they appear, although it is settled beyond dispute that his title does not extend beyond the water line:

Gould on Waters, Secs. 149, 155.
Jeffries v. Land Co., 134 U. S., 178.
New Orleans v. United States, 10 Pet., 662.
R. R. Co. v. Illinois, 146 U. S., 387.

And in this case, the water being non-navigable, the grant of shore land does, upon equally well-settled principles, carry title to the lake bed.

That such is the rule in respect to grants of swamp land bordering upon non-navigable water, has been expressly held by this Court, in Mitchell v. Smale, 140 U. S., 413, where it is said:

"Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this can not be done."

These instructions were palpably prejudicial to the plaintiff. The jury were told to find for the defendant unless they were satisfied by affirmative proof that the tract sued for was in existence as swamp land and bounded by the lake, at the date of the swamp land grant, seventeen years before the survey. If they believed that the lake had receded in the thirty-seven years intervening between the date of that grant and the trial, they were bound to deny the plaintiff's title to the reliction. For this error it is submitted that the judgment should be reversed.

III.

The four instructions excepted to and assigned as error disregard all the presumptions in plaintiff's favor arising from the official records put in evidence, and cast upon the

plaintiff a burden of proof almost impossible and quite unwarranted by the principles of evidence.

The trial was had nearly twenty years after the survey and more than thirty-seven years after the date of the swamp land grant. Plaintiff had bought in reliance upon the plats of the survey and held under patents referring to those plats and purporting to be an adjudication as the character of the land conveyed. The title asserted rested primarily, if not exclusively, upon these records, and, in the nature of things, could not be supported by very much other evidence.

The instructions excepted to directed the jury to find for the defendant unless they were satisfied by the preponderance of evidence that the plats of survey were correct in representing plaintiff's lots to be bounded by the lake, and this not only at the date of the survey but at a date seventeen years earlier.

While these instructions do not direct the jury to disregard the presumptions in favor of the plats, the reiterated employment of the phrase, "preponderance of evidence," without suggesting any discrimination in favor of the records, did in effect put that class of evidence upon a level with parol testimony, left the entire question as to their correctness to the jury, and must infallibly have led the jury to disregard the well recognized presumptions in favor of the survey and the patents.

These instructions also clearly suggest to the jury that the plats and patents were of themselves insufficient to entitle the plaintiff to a verdict, and direct a verdict to be for the defendant unless the records are corroborated by extraneous evidence deemed satisfactory to the jury.

The vice of such instructions lies, in the first place, in the fact that they ignore all presumptions in favor of official records, and cast the burden of proving their correctness upon the plaintiff, instead of requiring from the

defendant affirmative proof to impeach the records.

These plats were made, in pursuance of statutory requirements, by a public officer, acting under oath and under bond. His work was, under like statutory prescription, reviewed and approved by superior officers, acting under like sanctions. They were made in the interest of the public, intended for public use, and, at the date of the trial, had been before the public and used by the public for nearly twenty years. In such a case, therefore, the plats fall within the rule that every presumption is to be indulged in favor of the public records. As laid down by Mr. Greenleaf, they are—

"Admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the persons on whose authority the truth of the document depends. * * * Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to their investigation. On the ground, therefore, of the credit of agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence; and it is not necessary that they should be confirmed by the ordinary tests of truth. Besides this, it would always be difficult and often impossible to prove facts of a public nature by actual witnesses upon oath" (Greenleaf on Evid., Sec. 483).

And this court has said:

"In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man, in his

private and official character, does his duty, until the contrary is proved; * * * it will presume that all things are rightly done unless the circumstances of the case overturn this presumption."

Bank of U. S. v. Dandridge, 12 Wheaton, 64.

Of the multitude of cases illustrating these principles, it is worth to cite only two relating specifically to the returns of surveyors:

Galt v. Galloway, 4 Peters, 332.
Gonzales v Ross, 120 U. S., 605.

Upon these authorities it seems clear that it was error to instruct the jury to require of the plaintiff evidence in support of the plats. It is the essence of a presumption that it dispenses with further inquiry (Greenfeaf, Evid., Sec. 14). To seek or demand evidence in corroboration of a return presumed to be true, involves the anomaly of verifying that which itself imports verity, and of confirming that which is itself assumed to strengthen the infirmity of evidence.

If, in any way, the records produced by the plaintiff were open to question, the burden of showing them to be erroneous was certainly upon the defendant; and it was an error, distinctly prejudicial to the plaintiff, to require it to demonstrate the correctness of the plats by a preponderance of evidence.

It is further submitted that these instructions are erroneous in that they permit a collateral impeachment of public records, and leave the correctness of the survey at large to the jury.

The plaintiff's title was acquired after date of the survey and upon faith of the plats. The patents refer to the plats, and purport to convey lands bounded by and extending to the water of Lake Malheur. They are also an adjudica-

tion that the land up to the water line was of swampy character, adopting as they do the representations of the plats, and the rule being settled in this court that the patenting of a tract as swamp land is conclusive as to its character:

Chandler v. Mg. Co., 149 U. S., 79.
French v. Fyan, 93 U. S., 169.
Ehrhardt v. Hogaboom, 115 U. S., 67.

Moreover, the showing made by the plats having been adopted by and incorporated into the patents, any question of the plats is an attack upon the patents. The title of the plaintiff rests upon the survey as much as upon the patents, and it is impossible to impeach the plats without at the same time derogating from the effect of the patents.

The result, therefore, of opening the plats to question is to allow, indirectly, but not the less effectively, the patents to be collaterally impeached, and the plaintiff is deprived of a part of its purchase upon supposed proof of error in the survey, which is not only a part of the patents but their very foundation.

That patents can not be collaterally attacked, is, of course, elementary. Nor can a plat be corrected in this way upon suggestion of fraud or error when a title is passed by it:

Noble v. Logging Co., 147 U. S., 165.
Tubbs v. Wilhort, 138 U. S., 134.

Upon the same elementary principles, it would seem that a direct proceeding should be necessary in order to correct or limit the effect of a patent on account of error in the survey upon which such patent is founded. The patents in this instance, on their face and when read in connection with the plats, conveyed all the public land

up to the line of Lake Malheur: if, by reason of any error or fraud, the survey improperly included or omitted any public land, then the obviously proper mode of correction was a bill in equity putting directly in issue the supposed error or fraud. To allow the apparent purpose and legal effect of the patents to be defeated upon proof of error in the plats, does not differ, in principal or practical result, from canceling the patents in a suit at law.

This is the actual result in the present case. The patentee has been deprived of land which, if the plats are correct, is included in its patents, and this upon the sole ground that the evidence was supposed to show an error in the plats. This is *pro tanto* a defeat of the patents in an action of ejectment.

It is, therefore, submitted that the trial court erred in leaving the correctness of the plats and the effect of the patents to the jury in this proceeding, and for that reason the judgment should be reversed.

IV.

The instructions of the trial court are erroneous for the further reason that they make the plaintiff's title to the land conditional upon proof that the meandered boundary of the patented lots coincided precisely with the actual water line.

In the first instruction assigned as error the jury are told that the verdict must be for the defendant unless the plaintiff has proved that, "there was in reality a lake north of *and adjoining* said lots."

In the next instruction a verdict for the defendant is directed unless the jury are satisfied, by "a preponderance of the evidence, that there was a lake *immediately north* of" the lots patented to the plaintiff; and that the defendant is entitled to a verdict if the jury believe "that there was a swamp or marsh, instead of said lake, *imme-*

diately north of and adjoining said lots. In other words, it is a fact for you to determine whether or not that was a lake."

In the third instruction the jury are told that it must appear, by a preponderance of evidence, that, at the date of the swamp land grant, seventeen years before the survey, "said lots *were bounded* on the north *by the waters* of Malheur lake."

In the following instruction the jury are directed to find for the defendant unless satisfied that, at some date not even remotely indicated, the lots "bordered on the meander line," and that the entire body of land sued for has been left by recession of the waters as an accretion to the patented lots.

The evident purpose, and the inevitable effect, of these instructions was to inculcate upon the jury the necessity of absolute accuracy in the survey, and to impress them with the idea that the plaintiff was not entitled to any accretion or other riparian rights unless the surveyor's meander line coincided exactly with the actual water line. If the jury believed that, by accident, oversight or negligence, the surveyor had, at any point, left a strip of land between the location of his meander and the margin of the lake, then they must deny the title of the plaintiff.

In the second instruction, this is specifically stated. The jury are told that, if the surveyor left a strip of swamp or marsh unsurveyed, between his meander and the water, then that omitted strip remained public land, and its omission from the survey would confine the purchaser of the meandered lots to the metes and bounds indicated by the meander line. Inasmuch as the plats represented the swamp land up to the water's edge as being included in the lots, and the patents were, upon authorities already cited, an adjudication that the lots included all the swamp land up to that point, the jury were precluded from finding the

existence of an unsurveyed strip of swamp land between the lots and the water.

Independently of this, however, this and the other instructions are palpably erroneous in that they proceed upon the theory that the meander line, and not the water, is the boundary. The jury are allowed to find a variation between the water line and the meander, and, in that case, to return a verdict against the plaintiff. This is upon the principle that, if for any reason, or by any accident, a surveyor neglects to run his side lines to the actual margin of the water, or fails to lay his meander line precisely upon the water's edge, in that case a purchaser, buying the lots represented as extending to the water, will be limited to the lines actually run by the surveyor.

It will be observed that no limits as to the extent or gravity of the surveyor's error are indicated in the instructions. Whether the jury believed that the water lay only six inches or six miles from the meander line, they were equally, in either case, bound to find against the plaintiff.

That the theory underlying these instructions is erroneous, is too well settled to admit of argument. The meander line is not run as a boundary, but only to indicate the sinuosities of the bank and to assist in the computation of area:

Schurmeier v. R. R. Co., 7 Wall., 272.
Gould on Waters, Sec. 78.

The boundary is the water, wherever that may be and without regard to its distance from the meander line fixed by the surveyor:

Schurmeier v. R. R. Co., *supra.*
Bates v. R. R. Co., 1 Black, 204.
Newsom v. Pryor, 7 Wheaton, 7.

Hardin v. Jordan, 140 U. S., 371.
Mitchell v. Smale, 140 U. S., 406.

When a survey or a patent shows a body of water to be one of the boundaries of a tract of land, it is a legal deduction that there is no vacant land left between the water and such tract:

St. Clair Co. v. Lovingston, 23 Wall., 46, 63.
Gould on Waters, Sec. 194.

With respect to lakes, ponds, and other bodies of water not running streams, the same rules apply. Patents of the United States bounding on such waters are not limited by the meander lines, but carry title to the actual water line:

Hardin v. Jordan, *supra.*
Gould on Waters, Sec. 203.
Fuller v. Dauphin, 124 Ill., 542.
Clute v. Michigan, 65 Mich., 48.
Boorman v. Sumachs, 42 Wisc., 233.
Kraut v. Crawford, 18 Iowa, 550.
Poynter v. Chipman, 8 Utah, 442.

The same rule has obtained in Oregon:

Minto v. Delaney, 7 Oregon, 337.
Weiss v. Oregon Co., 13 Oregon, 496.

And is thus enacted in one of the statutes of that State:

"Where permanent and visible or ascertained boundaries or monuments are inconsistent with the measurements, either of lines, angles or surfaces, the boundaries or monuments are paramount."

Oregon Code, Sec. 845, Subd. 2.

The instructions excepted to clearly made it impossible for the jury to apply the correct rule to the facts. The trial court laid repeated stress upon its own erroneous rule that the meander line must coincide exactly with the existing water line and impressed upon the jury the necessity of an actual physical contiguity between the water of the lake and the boundary of the lots as defined by the surveyor's courses and distances. The jury were bound to deny the plaintiff's right to the accretion if they found any, even the most inconsiderable, discrepancy between the water line reported by the surveyor and the actual margin of the lake. They were told that they could not find for the plaintiff except upon affirmative proof that the water of the lake was "adjoining said lots," and "immediately north of and adjoining said lots," and that the lots were actually "bounded by the waters of Malheur lake," and that the lots actually "bordered on the meander line," that is the margin of the water as fixed by the surveyor. The jury were instructed to find for the defendant if they believed that any strip of swamp or marsh land was left by the surveyor between his meander line and the actual water of the lake.

The opinion of the appellate court (p. 57) shows that such was the view of the trial court and that this view was approved on appeal. The opinion reads:

"If there never was a lake in front of plaintiff's lots or if one did not exist there at the time of the survey, then there was no natural object or monument marking the north boundary of said lots; hence resort must be had to the secondary evidence, viz: the courses and distances, which are ascertainable from the plats and surveys, and they must prevail. The result is natural and the land conveyed would be just what a mathematical calculation would produce from the field notes of the survey of the fractional sections and the supposed meander line."

The authorities above cited show the error of this view. The theory of the appellate court, that the patentee's title may be limited by the sectional lines of survey, is specifically disapproved in Hardin v. Jordan, 140 U. S., 398. The "natural result," at which the opinion arrives, is that the patentee, who buys in reliance upon the Government's representation of a water frontage, finds himself limited to the lines fixed by the surveyor if, after twenty years, a jury can be induced to suspect that the surveyor did not actually run his lines to the very edge of the water.

It is accordingly admitted that the judgment should be reversed for this error in the instructions.

V.

The Supreme Court of Oregon, while not denying the general principles herein contended for, distinguishes the present case on the ground that Lake Malheur, at the date of the survey, lay so far distant from the plaintiff's lots as to preclude any claim of riparian purchase.

This, at least, is counsel's understanding of the meaning of the opinion. The court, in one passage, seems to concede that the lake existed, but in another (p. 57) assumes that the defendant had established the contention, "that there never existed a lake in front of or bordering upon the plaintiff's lots; that the question involved is not one of accretion or recession of the water, and consequent reliction, but of the existence of the lake upon which plaintiff anchors its claim; that this question was submitted to the jury, and, as the verdict was against the plaintiff, it is now precluded."

It appears, from the same opinion, that the defendant, while admitting the existence of Lake Malheur, had given evidence tending to show that it lay to the northeast of

plaintiff's lots, but at what distance is not mentioned (p. 58).

Assuming that defendant had proved the existence of the lake at some distance from the land surveyed, the court holds the instructions given below to have been correct, apparently regarding the distance or direction of the water as making this a case of exceptional character.

It may, in the first place, be objected that the record before this court does not embody any of the evidence to which the Supreme Court of Oregon refers as excepting this case from what is conceded to be the general rule in the construction of patents based upon public surveys. The bill of exceptions does not show that the lake lay at any extraordinary distance from the land surveyed, or that any evidence to that effect was given. If any such evidence was produced at the trial, the defendant, in order to avail himself of the exceptional state of facts supposed to exist, should have made it appear in the record. If the court below proceeded upon any such proof, this court is confined to the regular record, and resort can not be had to the opinion of the court below for information as to the character of the case made in that court:

> Stone v. United States, 164 U. S., 380.
> Lehnen v. Dickson, 148 U. S., 71.

In the second place, the instructions excepted to do not embody the doctrine approved by the appellate court. There may have been evidence tending to prove the nonexistence of Lake Malheur or to prove that the lake was several miles distant from the land; and it might be conceded that instructions applicable to that kind of evidence would have been unexceptionable. But the instructions complained of go much further and made it possible for defendant to prevail, or rather made it impossible for him

to fail, upon a much less extreme state of facts than is assumed in the opinion of the appellate court. Had the trial court told the jury to find for the defendant if they believed that Lake Malheur was ten miles, or one mile, or even a hundred yards, distant from the lots, a different question might have been presented. But, under the instructions given, they were obliged to find for him if they found the slightest discrepancy between the survey and the physical facts. The fact that the evidence may have warranted sound instructions does not cure the error of giving instructions which were unsound. The jury may not have believed the evidence tending to prove the extraordinary remoteness of the water, or supposed to establish the other facts held to make this an exceptional case. But they were required to find for the defendant upon a state of facts which concededly would not except this case from the general rule, and the plaintiff was defeated because it failed to prove affirmatively the absolute accuracy of the survey.

A third objection to the adoption of the view taken by the two courts below is that the defendant did not, in his plea or elsewhere in the record, lay the foundation for the defense which is supposed to except this case from the general rule applicable to riparian purchases. The existence of Lake Malheur is expressly admitted in the plea. It is not denied that the land is represented on the plats as bounded by that lake. Nor is it alleged that the lake lay at any such great distance, or in such a direction, from the land as would warrant a finding, as the appellate court phrases it, that "there was no lake to meander," and justify the conclusion that "the purchaser could not have bought upon the representation of the Government that there was."

Unless the defendant had set up some defense which would let in proof of some such extreme and extraordinary

state of facts as the opinion of the appellate court assumes, it was error to allow the jury to find such conditions, and error to affirm a judgment which required for its support the non-existence of the lake.

For these reasons it is conceived to be unnecessary to inquire how far the case presented to the court below involved such extraordinary conditions as might except it from what is conceded to be the general rule applicable to errors in public surveys. As the record does not, and properly could not, present anything more serious than a discrepancy between the meander line and the water line, the judgment should be reversed because the trial court misdirected the jury as to the law applicable to such a case.

VI.

Assuming that this record presents such a case as the Supreme Court of Oregon states, it is submitted that the doctrine held by that court is erroneous.

As before stated, it is extremely difficult to make out just what state of facts was supposed by the courts below to exist. The instructions of the trial court apply to the most inconsiderable discrepancy between the meander line fixed by the surveyor and the actual water line. The opinion of the appellate court seems to assume, sometimes, that there was no lake at all; in other places, that the lake was so far away from the land that it could support no claim of riparian rights; and, again, it is said that, "the pivotal question before the jury, as we have seen, was whether a lake existed in front of these lots" (p. 59).

Perhaps the conception of the facts and of the law held by the Supreme Court of Oregon is most accurately indicated by a passage quoted with approval from the opinion of another court:

"But there is no evidence that, at or near the time of the survey, or since, there has been any body of water *anywhere on the land*, upon which to base a meandered line" (p. 57).

Judging from the instructions given by the trial court, it would seem that both tribunals below held to this narrow view, and considered that the plaintiff must fail because it had failed to prove that the water was actually upon or contiguous to the land.

The opinion below may be considered most favorably, and the case may be conceived most advantageously to the defendant, by assuming that the allegations of the plea were sustained by the evidence. It is to be presumed that the defendant stated the case as much as possible in his own favor, and he could certainly have proved nothing more than he alleged.

The plea sets up, simply, that the meander line of 1877 was laid "a mile or more" from the actual water line then existing, leaving a belt of unsurveyed land between the lake and the surveyor's meander, and that the land sued for is not, to any appreciable extent, the result of subsequent reliction (p. 5, quoted above).

Taking the case at its best for the defendant, this averment marks the limit of his possible proof. The question, then, is, whether, upon proof of the state of facts alleged, the instructions of the trial court were correct.

The existence of Lake Malheur is admitted. More than this, it is admitted that the lake lies at no enormous distance from the land, but within a mile, or a little more, of the surveyor's meander. The plea shows also that the lake was platted as extending to the plaintiff's land, and it is not denied that the patented lots were represented as bounded by the water. It is not suggested that the surveyor was guilty of any fraud, nor is even any gross neg-

ligence averred. And there is no pretense, either in the plea, or elsewhere in the record, or even in the opinion, that the plaintiff was implicated in any possible fraud, or took with any knowledge or notice of the alleged discrepancy between the showing of the plats and the actual facts.

It is therefore the case of an entirely innocent purchaser who has bought land upon the faith of an official survey held out by the Government for the guidance of the public. And the question is, whether such a purchaser may be deprived of the water frontage guaranteed to him by the Government, upon proof of an error in the survey made twenty years ago.

Stated in this form, the authorities already cited admit of only a negative answer. The only ground upon which this case is sought to be taken from the general rule is the alleged fact that the error in the survey amounts to a discrepancy of about a mile between the meander line and the actual margin of the water.

It is only by assuming that the allegation of the plea was established that the question can be reduced to this form. The instructions of the trial court do not suggest that any such discrepancy was proved or needed to be proved. The opinion of the appellate court does not put the decision on the ground that the lake was a mile away from the land, but rather makes it material that there was no lake "in front of" of the lots, or that there was no "body of water anywhere on the land, on which to base a meandered line." But let it be assumed, for the sake of developing the supposed exceptional character of the case, that the actual distance of the water from the land was one mile.

It is not perceived how, upon principle, the extent of the discrepancy between the survey and the facts could affect the general rule. The principle, that fixed monu-

ments shall control course and distance, rests upon two considerations; first, that there is less likely to be error in a call for a natural object than in a call for an imaginary point; and, second, that the purchaser relies rather upon the representations of his plats and patents as to natural objects than upon the surveyor's measurements. These considerations operate as effectively where the error is great as where it is small. In the present case, the plaintiff, it may be presumed, looked to the lake to define the location of its land and not to the surveyor's courses; and it can scarcely be doubted that the Government's assurance of a water frontage was a more persuasive inducement to the purchase than any facts to be deduced from the mathematics of the field notes.

Now, whether the supposed error in the plats was great or small, the injustice done to the purchaser who bought in reliance upon the plats, would be equally real if his grant should be curtailed by reason of the negligence or fraud of the Government's officers. In this case, the plaintiff's title is not acquired under any law, such as the homestead law, which requires of the purchaser personal acquaintance with the land purchased, but under patents which were an adjudication that the whole tract, up to the water's edge, was swamp land. No rule of law required the State of Oregon, or its vendees, at their peril, to ascertain the character of the land. Still less were they required to verify the work of the public surveyors, lest some error should creep into the official calculations, or to make perambulation of the land and ascertain that every measurement had been correctly made, that every post had been correctly set, and that the water stood exactly where the Government officers reported it. The purchaser was not bound to push his inquiry back of the plats, to investigate the process of their making, and to hazard his money upon questions settled by their official

approval and authoritative publication to the world. The State and her vendees were entitled to assume that the deputy surveyor did his full duty; that the Surveyor-General made the proper inquiries and full revision of the field work; that the Commissioner of the General Land Office did not approve the plat unadvisedly or inconsiderately; that the plat itself, like a patent, is conclusive evidence that every fact legally requisite to its issue had been duly ascertained, and that every return upon which the validity of the survey depended had been duly verified. These purchasers were entitled to place upon the plats such credit as was due to the stringent legal guaranties of their correctness and to the high authority of their official sponsors. If, in spite of the severe scrutiny under which surveys must pass, and in spite of all the inquisitorial agencies of the Government, errors had crept into these plats, it would be too much to expect that any mere private individual should detect them, and too much to hold that such an individual should suffer because of the negligence of public officers.

The title of the plaintiff in error was acquired in 1894, seventeen years after the survey. Coming upon the land at that date, if it had appeared that the water was a mile from the meander line, the plaintiff might well have attributed the discrepancy to reliction. Even had there been a suspicion of fraud or negligence in the survey, the intending purchaser could not have remedied it, and the only way in which he could obtain the desired water frontage was to buy the land that was represented to lie upon the lake. It was not his duty to detect a possible error in the survey, nor, having detected it, could he disregard the record of the survey.

Whether the discrepancy between the survey be great or small, the same considerations apply, and, as a practical consideration, it would be impossible to fix any limit,

beyond which the general rule shall not apply and the purchaser shall be held responsible for the error in the survey. Neither of the courts which have considered this case has undertaken to indicate how gross must be the surveyor's error to constitute the case an exception to the ordinary rule, and no authority known to counsel suggests any such limit. In the present case, it seems to have been left to the jury to determine whether, in their opinion, the error of the survey was great enough to impeach the records and to curtail the effect of the patents. It is obvious that this can not be a satisfactory method. One jury may require a very gross discrepancy, while another would deny riparian rights on account of a very trifling error, and land titles depending upon water boundaries would be as unstable as the water itself.

Upon authority, it is conceived to be not less well settled that public surveys are not open to question and correction as against those who have purchased in reliance upon such surveys. Even where the surveyor's error was one of law, being the division of a section in violation of the statute, it was held by this court that the error could not be rectified to the prejudice of the Government's vendee:

> Gazzam v. Phillips, 20 How., 372.
> Overruling Brown v. Clements, 3 How., 650.

So where the purchaser was shown by a corrective survey to have built his house outside the tract bought by him, the Government was held bound by the original survey:

> Lindsay v. Hawes, 2 Black, 554.

With respect to riparian rights, as dependent upon public surveys, this court and other Federal courts have al-

ways held that errors in the surveys would not prejudice the right of a riparian grantee to hold to the actual water line. The authorities already cited establish this doctrine, and they are all cases of more or less grave discrepancies between the plats and the physical facts. Thus, in Schurmeier v. R. R. Co., the survey had omitted an island of 2.78 acres from a subdivision of only 9.28 acres, and the purchaser obtained about one-third more land than he had paid for. In Hardin v. Jordan and Mitchell v. Smale, *supra*, there was an ascertained omission of a considerable area from the survey.

And in such cases, it is well settled that the public is bound by the surveys of the Government, even where gross and apparent errors exist in the surveys. The principle is, that the Government, as owner of the land, has the right to determine its boundaries and subdivisions, and all persons dealing with the land are bound by this official determination. In Bates v. R. R. Co., 1 Black, 204, attempt was made to impeach a public plat by showing that the Chicago River, which was platted as flowing in one direction, did, at the date of the survey, flow in another. This court said:

"It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of water only temporary at particular times. * * * The public had the option to declare the true mouth of the river for the purposes of a survey and sale of the public land."

The same doctrine is thus laid down in Mann v. Tacoma Land Co., 44 Fed. Rep., 27:

"The work of the surveyors in the field, with their plats and field-notes, has been approved by the Commissioner of the General Land Office, and it is, as to all matters relating to the sale and disposition of lands of the

United States, conclusive and binding upon all persons having to deal with the United States, as well as upon the Government itself."

The few cases which, more or less distinctly, hold that the riparian purchaser may have his grant impaired by proof of the surveyor's omission of land, may be briefly noticed.

Granger v. Swart, Woolworth, 88, was a *nisi prius* case in a circuit court prior to the date of the Schurmeier case, and can not be considered an authority in view of the rule established by the case in this court.

Lammers v. Nissen, 4 Nebraska, 245, and Fuller v. Shedd, 161 Ill., 462, may be taken to settle for the States of Nebraska and Illinois a different rule from that which prevails generally and in Federal courts. The Nebraska case is prior in date to Hardin v. Jordan, and would probably not now be followed in that State. Fuller v. Shedd seems avowedly to repudiate the doctrine laid down by this court, in Hardin v. Jordan, and applied to the same or neighboring land.

Grant v. Hemphill, 92 Iowa, 218, the case cited and chiefly relied upon by the Supreme Court of Oregon in this case, can, at the best, do no more than establish for the State of Iowa a rule which is contrary to that generally prevailing. That case might be distinguished on its facts from this, but such an examination is not worth while in view of later cases in the same State which appear to discredit it. In Schlosser v. Cruikshank, 96 Iowa, 414, it was held that the omission of a considerable body of land from a survey would not defeat the riparian rights of one who had purchased land represented as extending to the water; and in Rood v. Wallace, 79 N. W. Rep., 449, the same court went still farther in the same direction.

Glenn v. Jeffrey, 75 Iowa, 20, and Horne v. Smith, 159 U. S., 40, do not affect the general rule contended for. Both were cases in which the grants were held to extend to bodies of water, and the only effect of either case is to establish the rule that a grant bounded by water can not be extended to reach another and more distant body of water.

Niles v. Cedar Point Club, 175 U. S., 300, was a case in which the survey was represented as closing upon a marsh, and not upon any body of water. The plat, therefore, afforded no ground for a claim of riparian ownership, and the decision does not touch the present question.

In Mitchell v. Smale, *supra*, this court, while deciding that a riparian purchaser is entitled to claim to the edge of the water, intimate that there may be cases of plain and obvious mistake or of gross fraud on the part of the surveyor in which the Government may "have the right to recall the survey, and have it corrected by the courts or in some other way." To understand this passage as indicating that an innocent purchaser may be prejudiced by such errors or that the right of correction may be exercised so as to curtail or defeat his grant, would be contrary, not only to the uniform course of decision in this court, but to the effect of the decision in that very case.

The true rule, as counsel understands it, is that an error in a survey may be corrected before the approval of the plats, or afterwards so that no rights acquired on faith of the plats be prejudiced. But, to say that an error may be corrected at the expense of an innocent purchaser would be contrary to natural justice, and in the face of positive declarations of this court.

The rule is thus laid down in Cragin v. Powell, 128 U. S., 699:

"It is conceded that the power of supervision and correction by the Commissioner of the General Land Office

is subject to necessary and decided limitations. Nor is doubted that, when the Land Department has once made and approved a governmental survey of public lands (the maps, plats, field-notes and certificates all having been deposited in the proper office), and has sold or disposed of such lands, the courts have power to protect the private rights of the party who has purchased in good faith from the Government against the interferences or appropriations of corrective resurveys made by that department subsequently to such disposition or sale."

In Mitchell v. Smale, 140 U. S., 412, where the surveyor had left a considerable body of land between his meander line and the water, it was said:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned."

Attention is particularly invited to two cases in which the extent of the surveyor's error was as great as is alleged and could have been proved in the present case.

Kirwan v. Murphy, 49 U. S. App., 658, was a case in which the surveyor had omitted from survey a tract, between the water and his meander line, about a mile wide and covered with trees much older than the survey, the area being so great and so disproportionate to the extent of the whole survey as to suggest gross fraud. But the Government had sold the land according to the plats, and

the Land Department was enjoined from making a resurvey. The court held it immaterial that the land involved was shown not to have been formed by accretion or reliction, saying:

"It is contended by the appellants in this case that the lands between the meander line as shown on the plat and the actual waters of the lake is not accretion or reliction, and therefore that the authorities above cited have no application, and that the title to the land did not pass by the patent; that it is not a question of riparian rights since the lake was the same at the time of the survey as it is now. We think this can make no difference, as the plat of survey returned to the general and local land offices and referred to in the patent for identification of the land, exhibited the granted tracts as actually bordering on the lake. * * * The fundamental right of riparian ownership consists in the right of access to the water, and it is in order to make that right available and complete that the doctrine is appiled to cases of accretion and reliction; but the same principle underlying these cases, namely, the right of access to the water, is equally applicable to the case at bar."

In Newsom v. Pryor, 7 Wheaton, 7, was presented a case of palpable and conceded fraud on the part of the surveyor. The field-notes showed side lines running to the water, which was called for at a distance of 894 poles, while the fact was that the course indicated fell short of the water by 328 poles, more than a mile. The result was that the grantee, under a patent for 5,000 acres, obtained about 1,800 acres additional, an increment of nearly 40 per cent. Mr. Chief Justice Marshall, in an opinion sustaining the purchaser's claim to extend to the water, said:

"It is apparent that a survey was not made in fact, but that, after marking a beginning corner, the surveyor made out and returned a plat which he supposed would comprehend the land intended to be acquired. It is now too

late to question the validity of grants made on such plats and certificates of survey. From the extraordinary circumstances of the country they were frequent, and, in consequence of those circumstances, have received the sanction of courts. An immense number of titles, believed to be perfectly secure, depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle can not be perceived, and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had actually been made."

It is, accordingly, submitted that the extent of the discrepancy between the representations of the plats and the actual facts is immaterial, and that, even in a case of error as gross as could possibly exist in the present, the public are bound, as against purchasers, by the public survey. As the Supreme Court of Oregon states in its opinion (p. 56):

"The real question of cardinal and pivotal concern arises upon the urgent and strong contention and argument of counsel for plaintiff, that the official survey of the lake, the approval thereof, and the official plats and maps made thereunder, showing the lake and the meander line thereof, conclusively establish the fact and location of the lake, and the Government and its grantees are estopped to deny the supposed facts as represented to the purchasers of abutting land. Mann v. Tacoma Land Co., 44 Fed., 27, supports this contention in its fullest signification; and Mitchell v. Smale, *supra*, may be said to sustain it."

As the decision below is thus avowedly in opposition to the doctrine of this and other Federal courts, it would seem on its face to invite reversal. And in view of the other considerations herein mentioned, it is submitted that the judgment should be reversed.

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